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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. ANGELA MARIE CASTILLO, Defendant and Respondent.	E063407 (Super.Ct.No. RIF1303920) OPINION

APPEAL from the Superior Court of Riverside County. Steven G. Counelis, Judge. Affirmed.

Michael A. Hestrin, District Attorney, Emily R. Hanks, Deputy District Attorney, for Plaintiff and Appellant.

Steven L. Harmon, Public Defender, Laura Arnold, Deputy Public Defender, for Defendant and Respondent.

On January 8, 2014, defendant and respondent Angela Marie Castillo entered a guilty plea to second degree burglary based on her entry into a Wells Fargo bank to cash a check made out to herself on another person's account. On

November 14, 2014, voters passed Proposition 47, which reduced certain nonserious, nonviolent felonies to misdemeanors and added misdemeanors to the Penal Code. On December 2, 2014, defendant filed a petition to recall her sentence (Petition) as required by Proposition 47, stating that her felony conviction of second degree burglary should be reduced to a misdemeanor under Proposition 47. The trial court granted the Petition finding defendant had shown that her felony conviction of second degree burglary constituted a violation of Penal Code section 459.5,[1] shoplifting, a misdemeanor added by Proposition 47.

Plaintiff and appellant the People of the State of California appeal from the order granting the Petition. The People contend defendant failed to meet her burden of proving eligibility for resentencing, and the trial court erred in granting defendant's Petition because she remained guilty of second degree burglary even after Proposition 47. The People argue that defendant entered the bank to commit identity theft, not larceny, which remained a felony after the passage of Proposition 47. Further, the People contend that a bank is not a commercial establishment within the meaning of section 459.5. These issues are currently under review in the California Supreme Court in *People v. Gonzales*, review granted on February 17, 2016, S231171 and in numerous other cases. We affirm the trial court's order granting the Petition.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

On December 11, 2013, defendant was charged in a felony complaint with a violation of section 459, described as her willful and unlawful entry into a building located at 1111 West Sixth Street in Corona with the intent to commit "theft and a felony." She was also charged with felony check forgery in violation of section 475, subdivision (a) in that she did willfully and unlawfully have in her possession a check belonging to another person on an account at Wells Fargo bank in the sum of $120 with the intent to pass or utter the check.

On July 8, 2014, defendant signed a plea agreement in which she would plead guilty to both counts plus an additional violation of section 12022.1, an out-on-bail enhancement. On that same day, she entered a plea in court. The trial court stated, "You're charged in Count 1 with a violation of Penal Code 459, a felony, that on or about October 15th of 2013 you entered a building at 1111 West Sixth Street in Corona with intent to commit theft or a felony. [¶] To that charge what is your plea?" Defendant responded, "Guilty." As to count 2, the trial court stated, "Count 2, that you committed a violation of Penal Code Section 475(a), a felony, that on or about that same date and location you attempted to pass a check to the account of Geoff A. Sigmund . . . at Wells Fargo, with the intent to commit fraud or deceit. [¶] To that charge what is your plea?" Defendant responded, "Guilty." Defendant was sentenced to four years eight months. She was to spend two years in custody at the Riverside County Jail and on probation for the remainder of her term.

Defendant filed the Petition on December 2, 2014. She checked the box that she had been convicted of "Penal Code § 459 2nd Degree Burglary (Shoplifting)" and that she believed the value of the check or property did not exceed $950. She also stated that she was currently serving her sentence. The People responded that a bank was not a commercial establishment. Both parties filed briefs regarding resentencing. The People provided further argument that a bank was not a commercial establishment and that defendant entered the bank to commit a felony, specifically, felony identity theft and forgery.

The matter was heard on March 20, 2015. Relying on the plain language of section 1170.18, the trial court found that a bank was a commercial establishment. Without making any other finding, the trial court found that defendant's violation of section 459 was a misdemeanor violation of section 459.5. The trial court struck the out-on-bail enhancement and reduced the violation of section 475, subdivision (a) to a misdemeanor pursuant to section 1170.18.[2] Defendant was out of custody. She was given credit for time served and her probation was terminated.

DISCUSSION

Proposition 47 added section 1170.18. Subdivision (a) of section 1170.18, provides in pertinent part, "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in

[2] The People do not appeal this determination.

effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act."

Under section 1170.18, subdivision (b) the trial court first determines whether the petition has presented a prima facie case for relief under section 1170.18, subdivision (a). If the petitioner satisfies the criteria in subdivision (a), then he or she will be resentenced to a misdemeanor, unless the court, within its discretion, determines the petitioner would pose an unreasonable risk to public safety. (§ 1170.18, subd. (b).)

In this case, defendant entered a guilty plea of burglary in violation of section 459. Specifically, she pleaded guilty to entering "a building at 1111 West Sixth Street in Corona with intent to commit theft or a felony." Section 459 is not listed in Proposition 47 and remains after the effective date of Proposition 47. Second degree burglary, which is defined in relevant part as the entering of a building other than a residence "with intent to commit grand or petit larceny or any felony," remains punishable as either a misdemeanor or a felony. (§§ 459, 461, subd. (b).)

However, Proposition 47 added section 459.5. Section 459.5 provides, "[n]otwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open

during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) As such, shoplifting consists of four elements, which must be found by the trial court as follows: (1) entry into a commercial establishment; (2) while that establishment is open during regular business hours; (3) with the intent to commit larceny; and (4) the value of the property that is taken or intended to be taken does not exceed $950. (§ 459.5, subd. (a); see also *People v. Contreras* (2015) 237 Cal.App.4th 868, 892.) The crime of shoplifting, with certain exceptions not relevant here, is punishable only as a misdemeanor.

Here, the parties do not dispute that the amount involved in the case was less than $950. There also is no dispute that the bank was open during regular business hours. The questions in this case are (1) whether defendant entered the bank with the intent to commit larceny or a felony, and (2) whether the bank was a commercial establishment.

The trial court assumed defendant entered the bank to commit larceny. "Theft" is defined in section 484, subdivision (a) as follows: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains

credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft." As such, the term "theft" includes theft by false pretenses, that is, "knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money, labor or real or personal property." (*Ibid*.) Larceny is statutorily equated with "theft." Section 490a provides, "[w]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." (See also *People v. Nguyen* (1995) 40 Cal.App.4th 28, 31.) The electorate "is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted." (*People v. Weidert* (1985) 39 Cal.3d 836, 844.)

In *People v. Nguyen*, *supra*, 40 Cal.App.4th 28, the defendant was convicted of three counts of burglary for giving worthless checks to the victims in exchange for their property. On appeal, the defendant argued that he did not intend to commit larceny but rather theft by false pretenses, which would not support his burglary convictions. (*Id.* at pp. 30-31.) The appellate court rejected this argument finding, "[I]n 1927, the Legislature amended the larceny statute to define theft as including the crimes of larceny, embezzlement and obtaining property by false pretense. [Citation.] At the same time, the Legislature also enacted section 490a stating, '[w]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word "theft" were substituted therefor.'

[Citation.] Thus, the Legislature has indicated a clear intent that the term 'larceny' as used in the burglary statute should be read to include all thefts, including 'petit' theft by false pretenses." (*Id*. at p. 31.)

The conclusion that larceny includes theft by false pretenses is also supported by the intent of the voters. Proposition 47 was intended to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), p. 70.) Petty theft by false pretenses is exactly the type of nonserious, nonviolent crime that should be eligible for resentencing under Proposition 47.

Here, defendant pleaded guilty to second degree burglary based on the intent to commit theft *or* a felony. Her theft by false pretenses can be equated to larceny under these circumstances. The Petition filed by defendant stated she had been convicted of a violation of section 459 and that the check or property was under $950. She also submitted additional facts that she entered the Wells Fargo bank and attempted to cash a $120 fraudulent check. The teller determined that her signature did not match the signature on file for the account. Defendant fled. Defendant met her burden of establishing that her entry with the intent to commit theft by false pretenses qualifies as shoplifting under section 459.5.

The People argue that defendant entered the bank to commit identity theft, a felony. Identify theft is defined in in section 530.5, subdivision (a) as, "Every

person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170." Here, the evidence could establish defendant had the intent to commit identity theft. The trial court did not determine whether defendant entered with the intent to commit a felony or to commit theft by false pretenses. A possible resolution would be to remand to the trial court to determine whether the evidence established that she entered with the intent to commit identity theft or theft by false pretenses.

However, we cannot ignore that section 459.5, subdivision (b) states any act of shoplifting shall be charged as shoplifting and that no person who is charged with shoplifting may also be charged with burglary or theft of the same property. As stated, defendant's act of entering the bank constituted shoplifting. Based on the plain language of section 459.5, subdivision (b), she could not be further charged with burglary based on the intent to commit identify theft for this same act.[3] Proposition 47 did not modify section 459 as it applies to burglaries premised

[3] We do not resolve whether this language would foreclose a separate charge of identity theft as that issue is not before this court.

on the intent to commit other felonies, such as intent to enter a bank to commit an assault or a rape, it does foreclose those burglaries where the acts committed by the defendant constitute shoplifting.

Further, we reject the People's argument that a bank is not a commercial establishment. Because the term "commercial establishment" was not defined in the ballot initiative and is not defined in the Penal Code, we begin with the words themselves, giving them their ordinary meaning. "A dictionary is a proper source to determine the usual and ordinary meaning of a word or phrase in a statute." (*E.W. Bliss Co. v. Superior Court* (1989) 210 Cal.App.3d 1254, 1258, fn. 2; see also *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122 ["When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word"]; *Scott v. Continental Ins. Co.* (1996) 44 Cal.App.4th 24, 30, fn. omitted ["It is thus safe to say that the 'ordinary' sense of a word is to be found in its dictionary definition"].)

The Merriam-Webster Online Dictionary (2016) provides a simple definition for commerce as follows: "activities that relate to the buying and selling of goods and services." (<http://www.merriam-webster.com/dictionary/commerce> [as of July 26, 2016].) The full definition includes, "the exchange or buying and selling of commodities on a large scale involving transportation from place to place." (*Ibid.*) "Commodity" is simply defined as "something that is bought and sold" or "something or someone that is

useful or valued." (<http://www.merriam-webster.com/dictionary/commodities> [as of July 26, 2016].)

Black's Law Dictionary defines establishment as, "2. An institution or place of business." (Black's Law Dict. (8th ed. 2004) p. 586, col. 1.) Commerce is defined as "The exchange of goods and services, esp. large scale involving transportation between cities, states, and nations." (*Id.* at p. 285, col. 2.)

In the Code of Federal Regulations, pertaining to copyright law, commercial establishment is defined as "an establishment used for commercial purposes, such as bars, restaurants, private offices, fitness clubs, oil rigs, retail stores, banks and financial institutions, supermarkets, auto and boat dealerships, and other establishments with common business areas[.]" (37 C.F.R § 258.2 (2014).)

In *In re J.L.* (2015) 242 Cal.App.4th 1108, 1114, the court found that stealing a cellular telephone from a school locker did not qualify for resentencing under Proposition 47. It determined that, "[w]hatever broader meaning 'commercial establishment' as used in section 459.5 might bear on different facts, [the defendant]'s theft of a cell phone from a school locker room was not a theft from a commercial establishment." Thereafter, the court defined commercial establishment as follows: "Giving the term its commonsense meaning, a commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or *services*." (*Ibid,* italics added.) Commercial establishment is reasonably interpreted to include those businesses engaged in the

buying and selling of services. A bank is engaged in the buying and selling of services.

DISPOSITION

The order of the trial court is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.